Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1514

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

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OCTOBER TERM, 1977

No.

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Georgia-Pacific Corporation, petitions that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims.

OPINION BELOW

The opinion of the United States Court of Claims is reported at 568 F.2d 1316 and appears as Appendix A hereto.

JURISDICTION

The Court of Claims entered judgment on January 25, 1978. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1255(1) (1970).

QUESTIONS PRESENTED

1(a). Whether a Tucker Act claim of inverse condemnation involving over $10,000, within the sole jurisdiction of the United States Court of Claims (28 U.S.C. §§ 1346(a)(2), 1491), may properly be referred by the Court of Claims on grounds of "efficiency, expedition, and inexpensiveness" to a federal district court entertaining a condemnation action against the same property (28 U.S.C. § 1358; 40 U.S.C. § 258a), which action was filed by the United States almost seven months after the landowner's suit in the Court of Claims; or

1(b). Whether, absent a specific statutory grant, a jurisdictional basis exists in the federal district courts to entertain Tucker Act inverse condemnation claims against the United States which clearly exceed $10,000.

2. Whether a landowner, having properly brought a Tucker Act claim of inverse condemnation of over $10,000 before the United States Court of Claims, may be deprived of its right to reimbursement of litigation expenses under 42 U.S.C. § 4654(c) by reference of its claim to a federal district court entertaining a later-filed condemnation action against the same property.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this proceeding are 28 U.S.C. §§ 1346(a)(2), 1491 (1970 & Supp. V 1975) and 42 U.S.C. § 4654(c) (1970). Also relevant are 28 U.S.C. §§ 1346(f), 1358, 1506, 2409a(a), (b) (1970 & Supp. V 1975). These sections appear as Appendix B to this petition.

STATEMENT OF THE CASE

On August 22, 1975, petitioner Georgia-Pacific Corporation filed this action in the United States Court of

Claims, alleging that the United States had inversely condemned over 9,000 acres of its property in West Virginia during 1974 and 1975. The property at issue, located in the coal-producing region of West Virginia, is within the R. D. Bailey Lake Project, a Corps of Engineers flood control project first authorized by Congress in 1962. Petitioner asserted a claim of inverse condemnation by reason of a wide range of Corps of Engineers activity, all of which led to the limitation, postponement or abandonment of mining activity by petitioner's coal lessees. Demanding just compensation in excess of $10,000,[1] Georgia-Pacific sought relief in the Court of Claims, the only available forum under the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (1970 & Supp. V 1975). The United States denied all allegations of inverse condemnation.

Almost seven months later, on March 5, 1976, the government filed a condemnation action and a declaration of taking in the United States District Court for the Southern District of West Virginia, pursuant to 28 U.S.C. § 1358 (1970), and 40 U.S.C. § 258a (1970), encompassing the same property as that in petitioner's action before the Court of Claims.[2]

The condemnation proceeding in the district court was and continues to be based upon a March 5, 1976, date of taking; on this date, the United States was granted possession pursuant to the dictates of the Declaration of Taking Act, 40 U.S.C. § 258a (1970). Petitioner, how-

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[1] Although Georgia-Pacific did not specify a claim amount in its petition before the Court of Claims, the claim far exceeds $10,000. Indicative is the fact that in the subsequently filed action in district court, the United States deposited $3,500,000 to acquire possession and title under the Declaration of Taking Act, 40 U.S.C. § 258a (1970). United States v. 9,268.52 Acres of Land, Civ. No. 76-0045 BL (S.D. W. Va., filed March 5, 1976).

[2] *See* Georgia-Pacific Corp. v. United States, 568 F.2d 1316, 1318 (Ct. Cl. 1978), App. A, at A-2.

ever, had already alleged an earlier date of taking in the Court of Claims proceeding. Recognizing that a finding of inverse condemnation by the Court of Claims would nullify any district court determination of just compensation, petitioner requested that the district court stay its valuation proceeding until the Court of Claims had exercised its Tucker Act jurisdiction and decided whether the United States had taken the subject property between 1974 and 1975 by inverse condemnation.[3] The district court, without opinion, denied petitioner's motion on June 4, 1976, and the United States Court of Appeals for the Fourth Circuit dismissed Georgia-Pacific's appeal from that denial. *United States* v. *Georgia-Pacific Corp.*, 562 F.2d 294 (4th Cir. 1977).

Meanwhile, in the Court of Claims, the United States and the petitioner moved for summary judgment with respect to the issue of liability. The United States initially moved for summary judgment on May 24, 1976. On June 22, 1976, Georgia-Pacific moved to deny the motion for summary judgment as premature, or in the alternative for an enlargement of time within which to pursue discovery so as to respond to the motion. On January 17, 1977, petitioner responded to the United States motion and cross-moved for summary judgment. The Court of Claims granted neither motion, concluding that "a hard residue of factual dispute . . . would first have to be tried and determined in the Trial Division." [4]

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[3] As petitioner pointed out then and as the Court of Claims itself noted, for the district court to have then proceeded with the case would be to run the risk of contemporaneous litigation in two courts. Moreover, the litigation in the district court would prove utterly wasteful and unnecessary if Georgia-Pacific prevailed in the Court of Claims. *See* Georgia-Pacific Corp. v. United States, *supra*, 568 F.2d at 1321, App. A at A-8.

[4] Georgia-Pacific Corp. v. United States, *supra*, 568 F.2d at 1318-19, App. A, at A-3.

Rather than send the case to the Trial Division, the Court of Claims, *sua sponte*, suspended further proceedings and referred petitioner to the federal district court for resolution of its inverse condemnation claim.[5] Relying on *United States* v. *Dow*, 357 U.S. 17 (1958), the Court of Claims ruled that the district court had "authority", presumably meaning jurisdiction: (1) to determine whether the taking preceded March 5, 1976, the date the United States filed its condemnation action and declaration of taking, and (2) if it found an earlier taking, to value the property as of that prior date and award compensation against the United States in excess of $10,000.[6]

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Claims Raises Fundamental Questions of Federal Law on Which this Court Should Rule

A. The Decision Below Expands the Jurisdiction of Federal District Courts over Claims Against the Sovereign Without the Requisite Congressional Waiver of Sovereign Immunity

Under the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (1970 & Supp. V 1975), Congress has waived the sovereign immunity of the United States and conferred concurrent jurisdiction in federal district courts and the Court of Claims in certain defined cases where the claim does not exceed $10,000. In cases where the claim exceeds $10,000, the congressional waiver of sovereign im-

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[5] *Id.* at 1319, 1322, App. A, at A-4, A-11.

[6] 568 F.2d at 1319, App. A, at A-4. While aware of petitioner's claim for litigation expenses under 42 U.S.C. § 4654(c) (1970), the Court of Claims did not treat this issue in its disposition of the suit. This section extends to the landowner the right to reimbursement of reasonable attorney, appraisal and other fees after successful prosecution of an action under 28 U.S.C. §§ 1346(a)(2) or 1491 (1970 & Supp. V 1975).

munity and the accompanying jurisdictional grant extend only to the United States Court of Claims. The instant case arises under the Tucker Act and presents significant issues of jurisdiction and sovereign immunity. In considering whether to issue a writ of certiorari, this Court has noted that "the question of the jurisdiction of the District Court under the Tucker Act [is] of public importance." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). This Court, as the final authority on the federal court system, should resolve these complex questions.

This Court has long recognized that the United States may not be sued without specific statutory consent. *E.g.*, *Dugan* v. *Rank*, 372 U.S. 609, 610-11, 617 (1963); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *Ickes* v. *Fox*, 300 U.S. 82, 96 (1937). Further, this Court has repeatedly held that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *McMahon* v. *United States*, 342 U.S. 25, 27 (1951). Thus "a waiver cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969). *See also United States* v. *Michel*, 282 U.S. 656, 660 (1931); *Schillinger* v. *United States*, 155 U.S. 163, 166 (1894). This interpretive guideline has been applied specifically to the Tucker Act. *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *King*, 395 U.S. 1, 4 (1969); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941).

Moreover, the Supreme Court has held that private litigants must comply with jurisdictional limitations in statutory waivers of sovereign immunity. *E.g.*, *United States* v. *Shaw*, 309 U.S. 495, 501 (1940). "[I]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought." *Minnesota* v. *United States*, 305 U.S. 382, 388

(1939).[7] Through the Tucker Act, Congress has unambiguously granted exclusive jurisdiction to the Court of Claims in actions exceeding $10,000.[8]

In referring petitioner's inverse condemnation claim to federal district court, the Court of Claims has subjected the United States to suit and required Georgia-Pacific to litigate its action in a forum that clearly could never possess jurisdiction over petitioner's inverse condemnation claim as a separate action.[9] The fundamental issue posed in this case, therefore, is whether the subsequent filing by the United States of a complaint in condemnation before a district court somehow transforms a landowner's already-filed inverse condemnation action so as to allow its transfer consistent with the Tucker Act from the Court of Claims to federal district court; or viewed

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[7] Jurisdiction cannot be expanded by agreement, waiver or consent of the parties. *E.g.*, American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 & n.17 (1951); First State Bank & Trust Co. v. Sand Springs State Bank, 528 F.2d 350, 354 (10th Cir. 1976); Maguire v. Trans World Airlines, Inc., 403 F. Supp. 734, 743-44 (S.D.N.Y. 1975).

[8] The Court of Claims acknowledged jurisdiction over petitioner's claim of inverse condemnation. Georgia-Pacific Corp. v. United States, 568 F.2d 1316, 1322 (Ct. Cl. 1978), App. A, at A-11. Having acknowledged jurisdiction, no vehicle exists for "transfer" of the suit to federal district court. Congress has provided for transfer of an action by the Court of Claims only when that court concludes that it has no jurisdiction over the claim but that jurisdiction is proper elsewhere. 28 U.S.C. § 1506 (1970).

[9] A complaint filed in federal district court would have been summarily dismissed for want of jurisdiction since under the Tucker Act the United States has not consented to suits in excess of $10,000 in that forum. *See, e.g.*, Cleveland Chair Co. v. United States, 526 F.2d 497, 499 (6th Cir. 1975); Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912, 914 (2d Cir.), *cert. denied*, 364 U.S. 894 (1960); State Road Dep't of Florida v. United States, 166 F.2d 843, 844 (5th Cir. 1948); Turtzo v. United States, 347 F. Supp. 336, 339 (E.D. Pa. 1972).

Interestingly, this principle was recognized by the Court of Claims only one week after its decision in the instant case. Peerless Coal Co. v. United States, No. 102-76 (Ct. Cl. Feb. 3, 1978).

from a somewhat different perspective, whether initiation of a condemnation action by the United States in federal district court constitutes a waiver of sovereign immunity that expands the district court's statutorily prescribed jurisdiction over claims against the United States.

In the instant case, the Court of Claims has concluded that considerations of "efficiency, expedition, and inexpensiveness" [10] supersede the congressional mandate of the Tucker Act and thus the court has required petitioner to litigate its inverse condemnation claim in federal district court in response to the government's complaint in condemnation. Centralization of these two proceedings clearly exceeds the statutory waiver of sovereign immunity under the Tucker Act.[11] The decision below thus conflicts in principle with this Court's holding in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940): "The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity." [12]

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[10] Georgia-Pacific Corp. v. United States, 568 F.2d 1316, 1321 (Ct. Cl. 1978), App. A, at A-8.

[11] Unification of litigation, although a touchstone of practice under the federal rules, may well be inapplicable when the United States is a party to the suit. In fact, the examples cited by the Court of Claims—"the theory of the compulsory counterclaim" and "the creation of the Judicial Panel on Multidistrict Litigation"—are singularly inappropriate here. *See* Georgia-Pacific Corp. v. United States, *supra*, 568 F.2d at 1321, App. A, at A-9. A counterclaim against the United States cannot exceed the jurisdictional limit of $10,000 that would apply if the claim were brought separately in federal district court as a direct claim. United States v. 40.60 Acres of Land, 483 F.2d 927, 928 n.1 (9th Cir. 1973). The benefits to be derived from employment of the judicial panel on multidistrict litigation can only be reaped in civil actions pending in different federal district courts; the United States Court of Claims lies outside the ambit of this scheme. 28 U.S.C. § 1407 (1970).

[12] Also instructive in considering the conflict between jurisdictional limitations upon Tucker Act condemnation related claims and efficiency considerations are United States v. 967,905 Acres of Land,

Congress has not been unmindful of the occasional bifurcation of suits required by the Tucker Act. Only recently, at the time Congress conferred plenary jurisdiction upon the federal district courts in quiet title actions against the United States, provision was also made for the determination of all just compensation issues in the same action in the event title was found to be in the private landowner and the government elected to retain possession. 28 U.S.C. §§ 1346(f), 2409a(a),(b) (Supp. V 1975). Realizing that, theretofore, a plaintiff could receive just compensation in excess of $10,000 only if an additional suit was filed in the Court of Claims, Congress provided a specific statutory exception to the Tucker Act. Under 28 U.S.C. § 2409a(b) (Supp. V 1975), a federal district court not only can quiet title, but also can award unlimited compensation for the government's takings, past and future, thereby making unnecessary a second suit in the Court of Claims.[13]

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447 F.2d 764, 768-69 (8th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972); Philips v. United States, 206 F.2d 867, 869-70 (9th Cir. 1953), *rev'g* United States v. 266.33 Acres of Land, 96 F. Supp. 647 (W.D. Wash. 1951); United States v. 1,440.35 Acres of Land, 438 F. Supp. 1070, 1074 (D. Md. 1977); United States v. 3.66 Acres of Land, 426 F. Supp. 533, 537 & n.3 (N.D. Cal. 1977); United States v. Certain Parcel of Land, 51 F. Supp. 726, 727 (E.D.N.Y. 1943). Each of these decisions underscores the primacy of jurisdictional limitations.

[13] The legislative history of 28 U.S.C. § 2409a(b) (Supp. V 1975), and its related provisions including 28 U.S.C. § 1346(f) (Supp. V 1975), clearly indicates that Congress amended the Tucker Act to prevent bifurcation of quiet title actions. In discussing the final bill, the House report states:

> If the United States were adjudged to be occupying without title, the Justice Department concluded that it is only fair to require it to choose between acquiring the right of possession and ceasing to occupy the land. As it has been noted, it presently is possible under the Tucker Act provisions of section 1346 of title 28, for a land owner to assert a claim for compensation for the acquisition of property by the Government. *The difference in the remedy provided by this bill is that the*

Nothing short of yet another specific statutory exception to the Tucker Act can justify reference of the present case to a federal district court.

B. The Erroneous Expansion of District Court Jurisdiction has no Basis in Prior Decisions of this Court

The Court of Claims based its decision in large part on the holding of this Court in *United States* v. *Dow*, 357 U.S. 17 (1958).[14] The Court of Claims has severely misapplied the *Dow* decision, and the effect thereof requires review and clarification by this Court. *E.g.*, *Wilkinson* v. *United States*, 365 U.S. 399, 401 (1961); *Braen* v. *Pfeifer Oil Transp. Co.*, 361 U.S. 129, 130 (1959).

The reliance of the Court of Claims on *Dow* is misplaced. *Dow* did not involve or address the jurisdiction of federal district courts as condemnation tribunals. It dealt only with what constituted the act of taking and when a claim for just compensation arising therefrom vested.[15] The Court ruled that a just compensation claim

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district courts would have jurisdiction without regard to any jurisdictional amount such as that contained in section 1346 (a)(2). Accordingly a district court could resolve the complete matter in one proceeding.

(Emphasis added.) H.R. Rep. No. 1559, 92d Cong., 2d Sess. 7 (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 4547, 4552. *See* United States v. Drinkwater, 434 F. Supp. 457, 463 (E.D. Va. 1977).

[14] Georgia-Pacific Corp. v. United States, 568 F.2d 1316, 1319-21 (Ct. Cl. 1978), App. A, at A-4 to A-7.

[15] In *Dow*, the United States had instituted condemnation proceedings in March 1943, pursuant to the predecessor of 28 U.S.C. § 1358 (1970). Under title II of the Second War Powers Act of March 27, 1942, 56 Stat. 176, 177, the district court granted the United States immediate possession, and the government entered into "physical possession" of the property within the next 10 days. Some three years later, in May 1946, the government filed a declaration of taking and formally acquired title. 357 U.S. at 18-19.

vests when the United States acquires possession, holding: "The usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking." 357 U.S. at 22. No claims of inverse condemnation were involved. Thus Tucker Act jurisdiction of the federal district courts was not an issue. Under either potential valuation date in *Dow*, district court jurisdiction had been invoked by the United States and was proper under what was then the equivalent of 28 U.S.C. § 1358 (1970).[16]

Nonetheless, *Dow* did point out that federal court jurisdiction over any inverse condemnation claim was under the Tucker Act.[17] Thus the extent of district court jurisdiction over a claim of inverse condemnation can be no greater than as specified in the Tucker Act—*i.e.*, claims

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[16] The present section 1358 of title 28 is derived from and based upon 40 U.S.C. § 257 (1940 ed.) which in turn was a codification of the Act of August 1, 1888, ch. 728, § 1, 25 Stat. 357, *as amended*, Act of March 3, 1911, ch. 231, § 291, 36 Stat. 1167. The Court noted in *Dow* that the United States had brought suit, in March 1943, under, *inter alia*, "the Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. § 257." 357 U.S. at 18.

It is clear that 28 U.S.C. § 1358 (1970) will not support an inverse condemnation claim against the United States. *E.g.*, Turtzo v. United States, 347 F. Supp. 336, 337 (E.D. Pa. 1972). As succinctly put in Ledford v. Corps of Engineers, 500 F.2d 26, 28 (6th Cir. 1974):

> This provision [28 U.S.C. § 1358] of the Judiciary Act was intended as a grant of jurisdiction to the district courts of actions brought *by* the United States and not of actions that might have an eminent domain nexus brought against the government.

(Emphasis in original.) *See also* Florida Beaches v. Niagara Inv. Co., 148 F.2d 963 (5th Cir. 1945).

[17] "Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491, to recover just compensation." 357 U.S. at 21.

for less than $10,000. And, therefore, inverse condemnation claims for amounts in excess of $10,000 are proper only in the Court of Claims. *Dow* cannot be cited to justify the decision below.

C. The Decision Below Contravenes Specific Congressional Policy by Depriving Petitioner of its Statutory Right to Reimbursement of Litigation Expenses

Congress, through 42 U.S.C. § 4654(c) (1970), has extended to a landowner the right to reimbursement of reasonable attorney, appraisal and other fees upon successful prosecution of a Tucker Act claim of inverse condemnation. By granting the right to reimbursement of litigation expenses, Congress sought to alleviate the financial burden accompanying successful prosecution of inverse condemnation suits. The holding of the Court of Claims in the instant case effectively nullifies this intent and subverts the clearly expressed congressional policy. For that reason, a writ of certiorari should issue. *See United States v. Coleman*, 390 U.S. 599, 604-05 (1968); *Rothensies* v. *Electric Battery Co.*, 329 U.S. 296, 302-03 (1946).

Had petitioner been successful in its Tucker Act claim of inverse condemnation before the Court of Claims, it would have been entitled to reimbursement of reasonable attorney, appraiser and other fees pursuant to 42 U.S.C. § 4654(c) (1970). In referring petitioner's claim to district court, the Court of Claims has deprived petitioner of its statutory right to reimbursement of these litigation expenses. This deprivation results from the Court of Claims having erroneously found a non-Tucker Act jurisdictional basis in the district court for petitioner's inverse condemnation claim (so-called broad condemnation court authority).[18] Under this ruling, the United States would be able to divest any future inverse condemnation plaintiff of the right to reimbursement of litigation expenses by subsequently filing a complaint in condemnation in district court. Even if the district court were to find an earlier date of taking (*i.e.*, an inverse condemnation), the rationale of the Court of Claims would dictate that, as a "condemnation court" having alleged jurisdiction under 28 U.S.C. § 1358 (1970), it could not award litigation expenses since 42 U.S.C. § 4654(c) (1970) applies only to courts acting under and exercising their Tucker Act jurisdiction.

[18] Georgia-Pacific Corp. v. United States, 568 F.2d 1316, 1320-21, 1322 (Ct. Cl. 1978), App. A, at A-6 to A-7, A-10.

II. The Decision of the Court of Claims is in Conflict with Decisions of the United States Court of Appeals for the Ninth Circuit

The United States Court of Appeals for the Ninth Circuit has addressed the precise jurisdictional issue posed in this case and has concluded that a condemnee cannot assert an inverse condemnation or earlier date of taking claim for an amount exceeding $10,000 in the district court in which the United States has filed a complaint in condemnation. In *United States* v. *Shingle*, 91 F.2d 85 (9th Cir.), *cert. denied*, 302 U.S. 746 (1937), and *United States* v. *John Ii Estate*, 91 F.2d 93 (9th Cir.), *cert. denied*, 302 U.S. 746 (1937), the United States sought to condemn privately owned fishing rights. Defendants filed answers claiming just compensation for the government's alleged taking of fishing rights prior to the institution of the condemnation proceedings. Arguing that naval regulations previously had prohibited them from fishing in part of the area subject to condemnation, defendants persuaded the district court to award compensation in excess of $10,000 for the earlier "partial taking." 91 F.2d at 87 & n.2. The Court of Appeals reversed the awards on the grounds that defendants had their remedy under the Tucker Act and not in the normal condemnation action. *Shingle*, 91 F.2d at 89; *John Ii Estate*, 91 F.2d at 94.

More recently the United States Court of Appeals for the Ninth Circuit has reaffirmed this decisional principle. In *United States* v. *422,978 Square Feet of Land*, 445 F.2d 1180 (9th Cir. 1971), the State of California claimed that the United States had taken the property at issue prior to the government's complaint in condemnation. The Court of Appeals affirmed the district court's dismissal of the state's claim, holding that the state's only remedy was under the Tucker Act and that the state had not filed suit within the six-year statute of limitations prescribed by 28 U.S.C. §§ 2401, 2501 for the Tucker Act actions. 445 F.2d at 1187-89.[19]

The instant decision directly conflicts with the aforementioned rulings of the Court of Appeals for the Ninth Circuit. The holding that petitioner must litigate its Tucker Act claim in the district court condemnation proceeding cannot be reconciled with determinations by the Ninth Circuit that a district court does not have jurisdiction over prior date of taking claims exceeding $10,000. This conflict of decisions, involving as it does important questions of federal law and federal court jurisdiction, necessitates resolution by this Court.

[19] *See also* Philips v. United States, 206 F.2d 867, 869-70 (9th Cir. 1953); United States v. 534.7 Acres of Land, 157 F.2d 828, 831 (5th Cir. 1946); United States v. Certain Space, 320 F. Supp. 491, 497 (N.D.N.Y. 1969), *aff'd*, 435 F.2d 872 (2d Cir. 1970), *cert. denied*, 402 U.S. 908 (1971); United States v. Certain Land, 203 F. Supp. 454, 458 (S.D.N.Y. 1958); Meyer v. United States, 150 F. Supp. 314, 316-17, 138 Ct. Cl. 86, 89 (1957).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue so as to allow summary reversal of the judgment of the Court of Claims. Absent summary reversal, a writ of certiorari should issue to review the judgment of the Court of Claims.

Respectfully submitted,

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April 24, 1978

Appendices

APPENDIX A

Opinion of the United States Court of Claims

IN THE UNITED STATES COURT OF CLAIMS

No. 315-75

(Decided January 25, 1978)

GEORGIA-PACIFIC CORPORATION v. THE UNITED STATES

Angelo A. Iadarola, attorney of record, for plaintiff. *Wilkinson, Cragun & Barker, Philip A. Nacke* and *Charles I. Appler*, of counsel.

L. Mark Wine, with whom was *Assistant Attorney General James W. Moorman*, for defendant. *Eric S. Gould*, of counsel.

Before DURFEE, *Senior Judge*,* DAVIS and KASHIWA, *Judges*.

ON DEFENDANT'S MOTION AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge*, delivered the opinion of the court:

This troubling problem is what should be done when a claimant brings suit in this court for an inverse condemnation of land interests, and not long thereafter the

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* Senior Judge Durfee died after the argument but before the preparation and adoption of this opinion.

Government files a District Court condemnation action involving the very same interests but asserting a later taking-date. On August 22, 1975, Georgia Pacific filed its petition here asking just compensation for an alleged taking by the Federal Government in 1974-1975 of certain of its land in West Virginia. About half-a-year later, on March 5, 1976, the United States filed a condemnation action and declaration of taking in the Southern District of West Virginia (*United States* v. *9,268.52 Acres of Land*, Civil No. 76-0045BL), covering all the land embraced in plaintiff's petition in this court but assuming that the taking occurred only on March 5, 1976.

Georgia-Pacific asked the District Court for a stay of the valuation proceedings in the condemnation suit until resolution of its claim in this court for a prior taking. The District Court denied this motion and the Fourth Circuit dismissed the company's appeal, holding the District Court's order non-appealable and also that there was no such abuse of discretion as to necessitate resort to the extraordinary remedy of mandamus. *United States of America* v. *Georgia-Pacific Corp.*, 562 F.2d 294 (1977). Meanwhile both parties had moved for summary judgment in this court, overwhelming us with long and detailed briefs, and a mass of affidavits and documents. Defendant urges, of course, that no eminent domain ensued upon the Government's activities in 1972-1976 until the institution of the West Virginia condemnation action in March 1976. Plaintiff sought to prove, on the contrary, that a taking had occurred before the beginning of the current suit in August 1975.[1]

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[1] In 1962 Congress first authorized the R. D. Bailey Lake Project (in West Virginia) primarily for flood control. After considerable study and reevaluation, the Project evolved into one encompassing approximately 20,000 acres in the coal-producing region of West Virginia. Georgia-Pacific was the largest land-owner, controlling some 7,000 acres in fee and having subsurface rights to another 2,500 acres. The company claims that at first the Corps of Engineers (which was responsible for the Project) allowed mining operators to continue their work so long as they did not interfere with the Project but that, beginning in 1972, the Corps, pushed by environmental interests represented on Congressional Committees, developed and ultimately put into effect severe restrictions on mining use in the area. These alleged restrictions, plus a series of threatened legal actions and asserted informal prohibitions and regulations, together with a refusal or inability to condemn the property outright—all alleged to have led to the limitation, postponement or abandonment of mining activity by plaintiff's coal lessees—are said by plaintiff to have constituted the inverse taking for which it sues in this court. Plaintiff says that thereby it "suffered a taking by defendant, without compensation, of its sub-surface mineral holdings totalling 9,288.07 acres, and so much of the surface as was necessary for development of the sub-surface within the designated Project boundaries." There was at no time any physical invasion of the property by the Government. The defense here is that the Government was merely exercising its rights under agreements it had with Georgia-Pacific and/or imposing lawful regulations which fell short of a taking.

If we felt compelled to determine the merits of the parties' respective positions, we clearly would not do so on these cross-motions for summary judgment. There is a hard residue of factual dispute which would first have to be tried and determined in the Trial Division. And to the extent that there are portions of the contested issues which might in the end be found to be "legal," they are so complex and so intermeshed with factual and particular details that we would first ask a trial judge to sift through the mass of material thrust upon us.[2] *See Cheyenne-Arapaho Tribes* v. *United States*, 206 Ct. Cl. 340, 349, 512 F.2d 1390, 1394 (1975); *Space Research Corp.* v. *United States*, Ct. Cl. No. 389-74, order of Nov. 11, 1977. This is another case in which summary judgment will not serve as a short-cut or a by-pass. *See Julius Goldman's Egg City* v. *United States*, 214 Ct. Cl. 556 F.2d 1096 (1977).

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[2] Plaintiff's briefs on the cross-motions run to 325 pages and its affidavits and documents add three additional volumes. Defendant's briefs came to 105 pages plus two and one-half volumes of affidavits and documents.

We have decided, however, that there is another course we can properly take and should follow. In our view, which we shall spell out, the District Court has the authority, in the condemnation suit, first, to determine whether the date of taking was March 5, 1976 (when that action was begun by the United States and the declaration of taking filed) or the pre-August-1975 date claimed by Georgia-Pacific in the present inverse condemnation case, and second, to value the property as of the date of taking it finds.[3] Accordingly, we shall suspend further proceedings in this litigation until the District Court has decided when the date of taking occurred, or has refused to inquire whether a time prior to March 5, 1976, is the correct one.

The legally significant bone of contention is the date of taking. Georgia-Pacific tells us that coal-land prices were higher in 1974-1975 and relatively low in March 1976 when the declaration of taking was filed; it is even hinted that the Government may have deliberately waited for such a favorable time before beginning its condemnation action in the District Court. That is why the company pushes its claim here.[4] But the District Court, in our opinion, is not bound to adopt the March 1976 date as the taking date for Georgia-Pacific's lands; if it accepts the present claimant's position it can find that the lands were taken on some date in 1974 or 1975, and then the court can value the property as of that time.

We draw this conclusion largely from *United States* v. *Dow*, 357 U.S. 17 (1958), in which the Supreme Court

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[3] Both parties summarily rejected this position when it was tentatively broached from the bench during oral argument. Nevertheless, after reflection, we consider it the most appropriate disposition.

[4] Plaintiff also notes that it would be able to obtain greater interest if the taking-date were in 1974-75, and that if the suit continued here Georgia-Pacific would be eligible (if it prevailed) for an award of attorneys' fees under 42 U.S.C. § 4654(c).

ruled in a condemnation suit that the claim to just compensation for the taking of an easement vested in the landowners at the time the Government entered into possession of the easement (1943) rather than the later date when the declaration of taking was filed (1946). In 1943 the United States brought a condemnation proceeding to acquire a certain right-of-way for a pipeline; no declaration of taking was filed at that time but the Government entered into immediate possession under a court order. Thereafter (in 1945) the tract (subject to the right-of-way) was conveyed to Dow and in 1946 the Government filed a declaration of taking covering the right-of-way, depositing estimated compensation.

The issue before the Court was whether Dow—who had no interest when the United States entered into possession in 1943 but did have an interest at the time of the declaration of taking in 1946—was entitled to any award for the right-of-way. The Court held not. It declared that Dow could prevail only if the "taking" occurred while he was the owner (357 U.S. at 20-21), but that the "taking" occurred in 1943 when the Government entered into possession of the right-of-way (357 U.S. at 21). If the United States enters into possession before the formal acquisition of title (which passes on payment), the normal rule is that "it is the former event which constitutes the act of taking. It is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued and the Government's obligation to pay interest accrues" (357 U.S. at 22). Similarly, where a declaration of taking is filed after the Government has taken possession, the date of "taking" is the prior date on which the Government entered and appropriated the property to public use (357 U.S. at 23). That rule is consistent with the principle that such entry is the time of taking for purposes of valuing the property and fixing the date on which the

Government's obligation to pay interest begins to run (357 U.S. at 24); the rule also works against manipulation by owners or the Government which might occur if a later declaration of taking were thought to be the taking (357 U.S. at 25).

The theory of *Dow*, with its insistence on the date of actual taking as the valuation date and the date from which interest begins to run, seems to us to empower the condemnation court, in a case like this, to find that the actual taking (like the Government's entry onto the right-of-way in *Dow*) preceded the declaration of taking. The one obvious difference from *Dow* is that there the condemnation suit had been brought before the entry was effected while here the taking claimed by Georgia-Pacific (if there was one) antedated the beginning of the condemnation suit (which was contemporaneous with the declaration of taking). Under the *Dow* rationale that distinction seems to us irrelevant to the authority of the condemnation court to determine the date of actual taking. Neither the terms of the legislation granting the Government the right to bring the condemnation action (33 U.S.C. §§ 591, 701c-1, *see also* 40 U.S.C. § 257), nor the conception of a condemnation suit, preclude the condemnation court from deciding that the actual date of taking preceded the filing of the suit. A condemnation suit is one means of determining that the Government has title to property or of passing title to the Government. The objective of such a suit is not restricted to effectuating a transfer of actual possession from the asserted landowner to the United States (though that is a sufficient aim, *United States* v. *93.970 Acres of Land*, 360 U.S. 328, 330, 332 (1959); *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 340 (1963)). Other significant purposes (which can be pursued even where the Government already has possession) are to pass title to the Government (as *Dow* held, title, distinguished from possession,

does not pass until compensation is paid or made available to the owner) or to make it clear, in case of dispute, that the Government already has full right to use or possess the property without payment of further compensation. *See United States* v. *93.970 Acres of Land*, *supra*, 360 U.S. at 330, 332; *Best* v. *Humboldt Mining Co.*, *supra*, 371 U.S. at 335, 340; *United States* v. *422,978 Square Ft. of Land, San Francisco*, 445 F.2d 1180, 1188-89 (9th Cir. 1971).[5] Even the function of valuation need not necessarily be performed by the condemnation court; the Supreme Court has held a condemnation suit sufficiently malleable and all-encompassing, where the Government's right to property is involved, to allow the court to delegate determination of a mining claim to administrative proceedings. *Best* v. *Humboldt Mining Co.*, *supra*. We consider, then, that the current theory of the condemnation suit allows the condemnation court great leeway, and that, where the Government sees fit to bring a condemnation suit, the court is authorized to make an authoritative determination, first, whether or not the property was compensably taken by the United States at all and if so when, second, of the value of that property as of that date of taking, and, third, of the passage of title to the Government through the ascertainment and payment of compensation.[6]

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[5] The *422,978 Square Ft. of Land* opinion said: "Filing the complaint in condemnation did not alone constitute a taking [citing cases] but was only a method of adjudicating the contention of the United States that the State [of California, the asserted landowner] was not entitled to compensation."

[6] In *United States* v. *422,978 Square Ft. of Land, San Francisco*, *supra*, 445 F.2d at 1182-84, 1187-1189, the Ninth Circuit decided, in a condemnation suit first brought in 1955, that the taking, if any, occurred in 1940 and the landowner (the State of California) was barred from all recovery in the condemnation suit because it failed to seek Tucker Act relief within six years (the limitations period) after 1940. Thus, the court held in a condemnation action begun in 1955, that any taking occurred no later than 1946.

To us, the standards of efficiency, expedition, and inexpensiveness (*cf. United States* v. *93.970 Acres of Land*, *supra*, 360 U.S. at 332) call for the centralization, in the present situation, of the whole proceeding in one tribunal rather than the bifurcation insisted upon by each party (*see* note 3, *supra*). The condemnation proceeding covers several parties in addition to Georgia-Pacific. We thus have only part of the eminent domain litigation in this court. If we were to decide the merits of the pre-March 1976 taking issue proffered by Georgia-Pacific, the District Court would either have to delay its entire proceeding until we had concluded ours, or go ahead with respect to other parties (at the risk of repetitive further litigation if it was ultimately decided here that Georgia-Pacific was wrong in its claim of a pre-March 1976 taking) or proceed with its whole case (at the risk of contemporaneous litigation in both tribunals, litigation which might prove wasteful and unnecessary in the District Court if Georgia-Pacific prevailed here on its claim). And even if the District Court (despite its previous denial of Georgia-Pacific's stay motion) chose to wait for our proceedings, the matter would still have to go back there if we decided that no taking occurred before March 5, 1976; we have no jurisdiction to determine valuation if the taking occurred only when the taking-declaration was filed on that date. The nub of it is that only the District Court is in a position to decide all phases of the litigation in the event Georgia-Pacific's claim of an early taking should be rejected.

Moreover, a single tribunal is better able than two or more independent courts to direct and handle variant and alternative claims all bearing on the same situation. Sometimes such unified treatment is precluded by jurisdictional statutes, but where it is not—as we think is true of this instance—it is ordinarily better to centralize the proceedings in the tribunal which has the widest

scope to handle all the parts of what is in commonsense one unified piece of litigation. That is a strong thread running throughout the law from the theory of the compulsory counterclaim to the creation of the Judicial Panel on Multidistrict Litigation.

To these demands of practicality there have been opposed some technical arguments which we consider unavailing. The Government has told us that the *Dow* theory can only be used where the Government itself puts forth (as it did in *Dow*) an earlier taking-date than the filing of the declaration of taking. We know of no reason why this should be so; nothing in the *Dow* opinion or the current theory of condemnation suits (as we understand it, *see supra*) gives the Government such a one-sided choice or precludes the landowner from saying that the actual taking (stressed in *Dow*) preceded the taking-declaration. On the other hand, Georgia-Pacific told the District Court[7] that that tribunal had no authority to consider a pre-March 1976 taking date because to take that course would be tantamount to entertaining a forbidden counterclaim by Georgia-Pacific against the United States under the Tucker Act for more than $10,000: But that position would be valid only if the District Court, in its role as a condemnation court, were forbidden from considering any date of taking before March 5, 1976, and accordingly were able to consider Georgia-Pacific's pre-March 1976 position only in its capacity as a Tucker Act court determining a monetary claim against the United States. We have shown above that the postulate is incorrect—that the District Court, as a condemnation court, can decide whether or not the taking occurred in 1974 or 1975. In the District Court there is no affirmative claim at all by Georgia-Pacific against the Government and the Tucker Act is not impli-

[7] In its Memorandum of Points and Authorities in Support of Defendant Georgia-Pacific Corp.'s Motion for Stay of Proceedings.

cated. The condemnation action puts in issue the date of taking if Georgia-Pacific so wills it; if Georgia-Pacific tells the condemnation court, as we think it should, that in the company's view the taking occurred before March 5, 1976, that court can (in our view) decide the question and determine compensation accordingly—all in its capacity as the condemnation court.[8]

We do not say that this court is without jurisdiction over the claim of a taking before March 1976. Our position is that both this court and the District Court can take account of, and decide, that claim—but that only the District Court, now that the Government has filed a condemnation suit, has authority to determine all aspects of Georgia-Pacific's right to compensation,[9] and therefore that the District Court is the preferred forum in which to center the whole litigation.

These are our views, but the District Court (or higher tribunals) may disagree either as to the range of the condemnation court's authority or as to the discretionary

[8] Neither *United States* v. *Certain Land*, 203 F.Supp. 454 (S.D. N.Y. 1958), nor *Meyer* v. *United States*, 138 Ct. Cl. 86, 150 F. Supp. 314 (1957), 141 Ct. Cl. 537, 159 F. Supp. 333 (1958), decides anything to the contrary. In *Certain Land* the Government's condemnation complaint itself admitted on its face, and the landowner agreed, that the United States had been in possession of the property, before the condemnation suit was commenced, as a holdover tenant under a specified lease from the defendant landowner—the condemnation suit purported to cover that prior period as well as future occupancy—and the court held that in those circumstances determination of the rental value for the prior period would necessarily amount to a Tucker Act suit for holdover rent which was for more than $10,000 and beyond the District Court's jurisdiction. *Meyer* involved the Government's defense that a lessor's complaint here was barred by 28 U.S.C. § 1500 where the Government had filed a condemnation suit purporting to cover, retroactively, the same leasehold interest; the court held that § 1500 bars only duplicative suits by claimants, and does not cover the situation where the other suit is brought by the Government itself.

[9] *I.e.*, only the District Court can determine valuation if the taking date is held to be March 5, 1976.

appropriateness of converging all aspects of this particular litigation in the District Court. We shall therefore do no more than suspend proceedings here until the District Court has had the opportunity to determine what course it will take. If that court (or a higher court) rules that it will not consider any date of taking before March 1976, we shall terminate the suspension here and proceed toward determination of the inverse condemnation claim of a pre-March 1976 taking. We have already indicated, *supra*, that in that event we shall need the help of the Trial Division in the face of the detailed issues and the overwhelming accumulation of affidavits, documentation, and argumentation presented to us.

Proceedings here are suspended to allow the District Court opportunity to decide whether it will consider any alleged taking date prior to March 5, 1976.

So ordered

APPENDIX B

Statutes

United States Code, Title 28:

§ 1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

• • • •

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

• • • •

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

§ 1358. Eminent domain.

The district courts shall have original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies.

§ 1491. Claims against the United States generally . . . .

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

§ 1506. Transfer to cure defect of jurisdiction.

If a case within the exclusive jurisdiction of the district courts is filed in the Court of Claims, the Court of Claims shall, if it be in the interest of justice, transfer such case to any district court in which it could have been brought at the time such case was filed, where the case shall proceed as if it had been filed in the district court on the date it was filed in the Court of Claims.

§ 2409a. Real property quiet title actions.

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

• • • •

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

United States Code, Title 42:

§ 4654. Litigation expenses.

• • • •

(c) The Court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking

of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of such proceedings.